Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1993

J. WALTER FEMLING and BLAINE COUNTY,

Petitioners,

vs.

EUGENE FARNWORTH,

Respondent.

Petition For Writ Of Certiorari To The Idaho Supreme Court

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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16 pp

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

EUGENE FARNWORTH, Plaintiff, v. J. WALTER FEMLING and BLAINE COUNTY, Defendants.	Case No. 15135 MEMORANDUM DECISION AND ORDER (Filed Oct. 12, 1990)

The above entitled matter came before the Court for hearing on Defendants' Motion for Summary Judgement and Plaintiff's Motion to Compel on July 16, 1990, the Honorable James J. May presiding. Plaintiff was represented by E. Lee Schlender of Hailey, Idaho; defendants were represented by David Sasser of Boise, Idaho. The hearing took place in the District Courtroom of the Blaine County Courthouse.

The Court having carefully considered; both motions, the briefs submitted by both parties, and the oral arguments of counsel, makes the following decision:

Summary Judgement may be granted if there is a showing that there is no genuine issue as to any material fact and the moving party is entitled to a judgement as a matter of law. I.R.C.P. 56(c). In Summary Judgement proceedings the facts are to be liberally construed in favor of the party opposing the motion, who is also given the

benefit of all favorable inferences which might be reasonably drawn from the evidence. *Smith v. Idaho State University Federal Credit Union*, 103 Idaho 245, 646 P.2d 1016 (Ct. App. 1982); *Doe v. Durtschi*, 110 Idaho 466, 716 P.2d 1238 (1986).

I.

Summary Judgement is GRANTED in favor of defendant Femling.

Plaintiff alleges that defendant Femling violated the equal protection clause, the freedom of association clause, and the free speech clause of the United States Constitution, and the Constitution of the State of Idaho, committed acts of tort and breach of contract.

42 U.S.C.S. Section 1983 provides that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, or the District of Columbia, subjects or causes to be subjected, any citizen of the Untied [sic] States or other person within the jurisdiction thereof to the depravation of any rights, privileges, or immunities secured by the Constitution and laws, *shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress.*

An exception to this rule is the doctrine of qualified immunity. The doctrine was explained in *Harlow v. Fitzgerald*, 457 U.S. 800, 73 L. Ed.2d 396, 102 S. Ct. 2727 (1982), wherein the Supreme Court of the United States held:

> that governmental officials performing discretionary functions are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

From *Harlow* through a number of later Supreme Court decisions the doctrine of qualified immunity has been further defined and applied. See *Davis v. Sherer,* 468 U.S. 183, 104 S. Ct. 3012 (1984); *Mitchell v. Forsyth,* 472 U.S. 511, 86 L.Ed.2d 411, 105 S. Ct. 2806 (1985); *Malley v. Briggs,* 475 U.S. 335, 89 L. ed.2d [sic] 271, 106 S. Ct. 1092 (1986); *Anderson v. Creighton,* 483 U.S. 635, 97 L. Ed.2d 523, 107 S. Ct. 3034 (1987).

Considering the facts of this case in a light most favorable to plaintiff, it is the decision of this Court that plaintiff's allegations of defendant's violation of rights and privileges provided for by the United States Constitution are barred by the doctrine of qualified immunity.

Plaintiff realleges his constitutional claims under the color of state law as provided in the Idaho State Constitution. Idaho Rule of Civil Procedure 9(b) explains that:

> in all averments of fraud or mistake, or violation of civil or *constitutional rights,* the circumstances constituting fraud or mistake, or violation of civil or constitutional rights *shall be stated with particularity.*

Giving the averments in plaintiff's complaint, and amended complaint the benefit of all favorable inferences it is the decision of this Court that the averments do not state with sufficient particularity a violation of state constitutional rights. Plaintiff has also sought relief under the

theory of breach of a covenant of good faith and fair dealing. In *Metcalf v. Intermountain Gas Company,* 116 idaho [sic] 622, 778 P.2d 744 (1989) the state Supreme Court recognized for the first time the doctrine of implied covenants of good faith and fair dealing. However, the decision makes it clear that the cause of action known as breach of an implied covenant of good faith and fair dealing will only be applied prospectively to breaches that occur after the effective [sic] of the opinion. Considering the facts of this case in a light most favorable to plaintiff it is the decision of this Court that plaintiff's action for breach of implied covenants of good faith and fair dealing is barred because the alleged breach occurred before the effective date of the *Metcalf* decision. This decision is not to be read as a finding by this Court that there was a breach, only that the law as stated in *Metcalf* bars plaintiff's claim.

For the above stated reasons defendant Femling's Motion for Summary Judgement is GRANTED.

II.

Summary Judgement is GRANTED in favor of defendant Blaine County.

Plaintiff alleges that defendant Blaine County violated the United States Constitution, the Constitution of Idaho, by committing acts in tort, and breach of contract.

As stated above 42 U.S.C.S. 1983 provides that no person shall violate the constitutional rights or privileges of another under the color of law. In *Monell v. New York City Department of Social Services,* 436 U.S. 658, 56 L. Ed.2d

611, 98 S. Ct. 2018 (1978), the Supreme Court of the United States held:

> Local governing bodies, therefore, can be sued directly under section 1983 for monetary, declaratory or injunctive relief . . .

The *Monell* Court went on to establish the "touchstone" of a 1983 claim:

> . . . the touchstone of the section 1983 action against a government body is an allegation that *official policy is responsible for a deprivation of rights protected by the constitution* . . .

Plaintiff alleges that a local governing body may be held liable for the decisions of its policy makers. The *Monell* Court went on to hold that local governing bodies could not be held liable under Section 1983 upon a theory of respondeat superior. The Court wrote:

> In particular, we conclude that a municipality cannot be held liable solely because it employs a tort feasor, in other words, a municipality cannot be held liable under Section 1983 on a respondeat superior theory.

Giving the averments in plaintiff's complaints the most favorable inference in light of the evidence before this Court it is the Court's decision that plaintiff has failed to establish an official policy, implemented by defendant, Blaine County, that is responsible for the deprivation of plaintiff's rights, and that defendant, Blaine County, cannot be held liable for violations of Section 1983 under a theory of respondeat superior.

Plaintiff realleges constitutional claims against defendant, Blaine County, under the color of state's constitution. As explained above, I.R.C.P. states that all such averments must be plead [sic] with particularity. It is the decision of this Court that plaintiff's averments fail to meet this particularity.

Plaintiff realleges defendant, Blaine County's liability upon a theory of respondeat superior under the Idaho Tort Claims Act (ITCA). Both the state Supreme Court and the Court of Appeals have explained the rule that absolute compliance with the provisions of the ITCA is a mandatory prerequisite to litigation of this kind. Failure to strictly comply with such provisions is fatal to any and all state law claims, regardless of their validity. See *Madsen v. Idaho Department of Health and Welfare*, 89 I.C.A.R. 753 (September 5, 1989); *McQuillen v. Amon*, 113 Idaho 719 (1987). In light of the evidence it is this Court's decision that these prerequisites have not been complied with, therefore plaintiff's state law claims are barred.

As a part of his state respondeat superior claim, plaintiff alleges that defendant, Blaine County, is liable for breach of contract. Idaho Code, Section 6-904(3) states:

> A governmental entity and its employees while acting within the course and scope of their employment and without malice or criminal intent shall not be liable for any claim which . . . arises out of . . . interference with contract rights.

Plaintiff, in his amended complaint, alleges that defendant, Femling, acted maliciously, and therefore defendant, Blaine County, should be held liable. Supposing that I.C. 6-904(3) did not apply, as a result of this new

averment, it is the decision of this Court that the case of *Metcalf*, supra, would apply, and bar any action for breach of contract against defendant, Blaine County.

For the above stated reasons defendant, Blaine County's Motion for Summary Judgement is GRANTED.

III.

Plaintiff's Motion to Compel is DENIED.

Counsel for defendants, Femling and Blaine County is directed to submit an order in compliance with this decision for the Courts consideration.

DATED this 12th day of October, 1990.

/s/ James J. May
James J. May
District Judge

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

EUGENE FARNWORTH, Plaintiff, v. J. WALTER FEMLING and BLAINE COUNTY, Defendants.	Case No. 15135 DECISION RE: SUMMARY JUDGMENT; MOTIONS (Filed May 14, 1992)

These matters come before the above-entitled court upon the motions of the plaintiff and the defendant. The plaintiff moves for reconsideration [sic] the summary judgment decision previously rendered in this case by The Honorable James May, moves for reconsideration of denial of plaintiff's motion to compel, moves to have the First Amended Complaint considered amended to include claims under the Idaho Tort Claims Act, and submits a first and second motion in limine.

The defendant moves for summary judgment and for Rule 11 sanctions; moving also for separate trials, and in limine.

Regarding both parties' motions in limine, the court notes that those issues will be decided closer to trial.

The plaintiff's motion for reconsideration of the plaintiff's motion to compel is denied pursuant to the Idaho Public Records Act, I. C. 9-340(36).

The defendant's motion for summary judgment is denied upon the issue of breach of contract. The defendant's motion for summary judgment is granted upon the issue of the implied covenant of good faith and fair dealing, as the plaintiff has failed to make a threshold showing that the defendants violated, nullified, or significantly impaired any benefit or right which had already accrued to the plaintiff as a result of the employment agreement. *Metcalf v. Intermountain Gas Co.*, 116 Idaho 622, 778 P. 2d 744 (1989). The cases following *Metcalf*, Id., have emphasized that covenant of good faith and fair dealing claims in Idaho are implied in contract, not in tort. *Sorensen v. Comm Tek, Inc.*, 118 Idaho 664, 799 P. 2d 70 (1990), *Burton v. Atomic Workers' Federal Credit Union*, 119 Idaho 17, 803 P. 2d 518 (1990), *Idaho First National Bank v. Bliss Valley Foods*, 35 Idaho Adv. Rep. 53 (1991).

Regarding the plaintiff's motion for reconsideration of the summary judgment, this court concludes that plaintiff's federal civil rights claim as to Femling is barred by the doctrine of qualified immunity. *Harlow v. Fitzgerald*, 457 U.S. 800, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1982) sets forth the relevant law. The *Harlow* case distinguishes between the doctrines of absolute immunity and qualified immunity.

Officials whose special functions or constitutional status requires complete protection from suit are afforded absolute immunity. This type of immunity requires a showing on the part of the federal officials seeking absolute immunity that public policy demands an exemption of that scope. Examples of officials granted absolute immunity are legislators in their legislative functions and judges in their judicial functions.

Qualified immunity is the norm for executive officials in general. Qualified immunity is also referred to as "good faith" immunity.

> "Qualified or 'good faith' immunity is an affirmative defense that must be pleaded by a defendant official. [Citation omitted]. Decisions of this court have established that the 'good faith' defense has both an 'objective' and a 'subjective' aspect. The objective element involves a presumptive knowledge of and respect for 'basic, unquestioned constitutional rights.' [Citations in remainder of quotation omitted]. The subjective component refers to 'permissible intentions'. Characteristically the Court has defined these elements by identifying the circumstances in which qualified immunity would *not* be available. Referring both to the objective and subjective elements, we have held that qualified immunity would be defeated if and [sic] official *'knew or reasonably should have known'* that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff], *or* if he took the action *with the malicious intention* to cause a deprivation of constitutional rights or other injury . . .

The U. S. supreme Court noted in *Harlow* that some courts had previously regarded the subjective component of qualified immunity to be a question of fact requiring resolution by a jury. However, the Supreme Court went on to state that inquiries into the subjective intent of an official can be peculiarly disruptive, and held that, "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct *does not violate clearly established statutory*

or constitutional rights of which a reasonable person would have known." (emphasis supplied) (*Harlow,* supra).

Thus the Supreme Court held that only the reasonableness of an official's conduct in relation to clearly established law is the standard for summary judgment:

> On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred. If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he be fairly said to "know" that the law forbade conduct not previously identified as lawful. Until this threshold immunity question is resolved, discovery should not be allowed. If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct. Nevertheless, if the official pleading the defense claims extraordinary circumstances and can prove that the [sic] neither knew nor should have known of the relevant legal standard, the defense should be sustained. But again, the defense would turn primarily on objective factors.

See also, *Mitchell v. Forsyth,* 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985), *Malley v. Briggs,* 475 U.S. 335, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986), *Anderson v. Creighton,* 483 U.S. 635, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987).

The case at bar is distinguishable from the case cited by the plaintiff, *Hansen v. White,* 114 Idaho 907, 762, P. 2d 820 (1988). In the *Hansen* case, the Idaho Supreme Court

held that a board of county commissioners possessed the statutory authority to create a county merit system which did not operate to abridge the county sheriff's constitutional right to appoint deputies. In the *Hansen* case, the county commissioners instituted a merit system which made it a rule that county employees could only be discharged for cause. In the case at bar, there is no such statute or constitutional right to limit the sheriff's ability to appoint deputies. The holding in *Gowey v. Siggelkow,* 85 Idaho 574, 382 P. 2d 764 (1963), which was found to be not applicable to the *Hansen* case, is precedential in the case at bar. The holding in *Gowey* is that the power to appoint is the corresponding power to remove, if the right to remove is not restricted by the law or in any other manner.

The plaintiff cites a recent decision by The Honorable William H. Woodland, *Young v. Jelbe,* Bannock County Case No. 40914-A which addressed the doctrine of qualified immunity in the termination of public employees. It is noted that the decision does not set forth the precise constitutional or statutory bases which would cause the defendants to lose the shield of qualified immunity.

The plaintiff also cites as authority a recent decision by the Idaho Supreme Court, *Lubcke v. Boise City/Ada County Housing Authority,* 98 I.S.C.R. 501 (1992). In that case, the Court found that there was evidence to support the plaintiff's argument that her termination was connected to the exercise of her First Amendment rights. However, it does not address the issue of qualified immunity.

Regarding the plaintiff's federal civil rights claim as to the county government, plaintiff correctly asserts that *Owens v. City of Independence* holds that local governing bodies are not afforded qualified immunity. However, the court in the case at bar refers to *Monell v. Dept. of Social Services of the City of New York,* 436 U.S. 658, 56 L.Ed. 611, 98 S.Ct. 2018 (1978), which holds that local governing bodies may be liable in situations where official policy of the entity has operated to deprive an individual of constitutional rights. The plaintiff claims that the Blaine County policy that produced a violation of his constitutional rights is the policy that employees of the sheriff's office are employees at will.

The court in the instant case concludes that deprivation of basic constitutional rights such as those articulated in *Harlow,* supra, could give rise to a federal civil rights claim against the county. However, it is decided that such a constitutional right has not been articulated here. For a county to have a policy that sheriffs' deputies are at-will employees cannot be said to violate a constitutional right of the fundamental nature of those described in *Harlow.* Accordingly, the defendant's motion for summary judgment as to the civil rights claim against Blaine County is granted.

Civil Rights claims based upon 42 U.S.C. 1983, while they may be enforced in state or federal courts, (*Bonner v. Circuit Court of City of St. Louis, Missouri,* 526 F.2d 1331 (1975)), are grounded upon federally created rights. *Ohio Inns, Inc. v. Nye,* 542 F.2d 673 (1986). Thus there is no 1983 action grounded upon the state constitution.

The plaintiff moves to consider the First Amended Complaint amended to include Idaho Tort Claims Act claims against the defendants. Count XV of the First Amended Complaint reads as follows:

> That plaintiff be allowed to amend this Complaint to add additional tort claims as may be necessary upon denial of a tort claim filed against Blaine County for torts and actions not specifically limited to those provided for by 42 U.S.C. Section 1983, upon denial of said claim by Blaine County.

The plaintiff's cause of action accrued on December 31, 1988, when he was terminated. I.C. 6-906 provides that notice of a tort claim against a governmental entity shall be provided within one hundred eighty days of when the claim accrued. This was accomplished by the plaintiff with a letter delivered February 23, 1989. However, I.C. 6-909 allows the governmental entity ninety days in which to deny the claim, and states that the claim is deemed denied if the governmental entity fails to respond within the allotted time period. I.C. 6-910 states that if the claim is denied, then the claimant may institute an action. In *Curtis v. City of Ketchum*, 111 Idaho 27, 720 P. 2d 710 (1986) a claimant's action was barred because he failed to wait the ninety-day statutory period before filing his suit.

In the case at bar, the first complaint was filed on March 7, 1989. In the *Memorandum Decision and Order* of The Honorable James J. May, filed in this case on October 12, 1990, it was held that the plaintiff in the absence of an express denial by the defendants, had failed to wait the

ninety day period. The plaintiff now moves to have the amended complaint serve as the tort claim.

Leave to amend the pleadings is to be freely granted when justice so requires. I.R.C.P. Rule 15(a). However, I.R.C.P. Rule 15(c) states the following:

> Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, *the amendment relates back to the date of the original pleading.*

(Emphasis added)

It can hardly be the intent of the drafters of the Idaho Tort Claims Act that the statute regarding the waiting period should be subject to cure by simple amendment of the pleadings. This is further bolstered by the Idaho Supreme Court case of *Curtis v. City of Ketchum*, supra, and by the strict construction afforded notice provisions of the Idaho Tort Claims Act in general. Accordingly, the plaintiff's motion to have the First Amended Complaint considered to include claims under the Idaho Tort Claims Act is denied.

Dated this 12 day of May, 1992.

/s/ J. William Hart
J. William Hart